On August 27, 2015, the US National Labor Relations Board (NLRB or Board) issued its long awaited decision in Browning-Ferris Industries of California (Browning-Ferris) and, not surprisingly, returned employers to a pre-1984 world.

At issue in the case was the Board’s “joint employer” standard under the National Labor Relations Act (NLRA). Enacted in 1935, the NLRA guarantees the rights of employees to organize, form unions and bargain collectively with employers. The Board, created by the NLRA, oversees the union organizing and campaign process, administers union representation elections, adjudicates labor-management disputes and determines whether employers have violated the NLRA. Statutory employers under the NLRA include both direct and putative “joint employers.” The issue of “joint employer” status most often arises when a company hires a contractor to perform work over which the contracting company has some measure of control.

The Board’s “joint employer” standard can be traced back to 1965 when the Board concluded that a company operating a bus terminal and its cleaning contractor were both employers of the contractor’s employees because they “share[d], or co-determine[d], those matters governing essential terms and conditions of employment.”

The Third Circuit reaffirmed this standard in 1982.

Prior to 1984, the Board interpreted “share or co-determine” to mean exercising, or reserving the right to exercise, direct or indirect control over the “terms and conditions” of employment. Beginning in 1984, however, the Board began to narrow the standard to require a showing that the employer “meaningfully affect[ed] matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction.” Over time, that standard was further narrowed to include only “direct,” “immediate” and “substantial” exercised control, and not “unexercised,” “limited” or “routine” control.

In Browning-Ferris, the Board re-examined this issue in the case of Browning-Ferris Industries, which operates a recycling facility in Milpitas, California, and the 300 employees who worked at its plant. Sixty of those workers were directly employed by Browning-Ferris, and the remaining 240 were employed by a staffing agency called Leadpoint Business Services. In 2013, a Teamsters union local filed a petition seeking to represent the 240 Leadpoint employees, arguing that Browning-Ferris and Leadpoint were joint employers. Applying the Board’s post-1984 control test, the regional director found that Browning-Ferris was not a joint employer. The Teamsters filed a request with the Board for review, and in May 2014 the NLRB invited the submission of amicus briefs to address whether the Board should “adhere to its existing joint-employer standard or adopt a new standard.” Numerous private parties submitted amicus briefs, and the NLRB general counsel filed an amicus brief advocating for a return to the Board’s pre-1984 standard.

In a 3-2 decision, the NLRB overturned 30 years of precedent and returned to its pre-1984 standard. The Board specifically stated that the joint-employer inquiry should not be limited to “directly and immediately” exercised control.
Instead, a putative joint employer may be liable if it “possesses the authority to control employees’ terms and conditions of employment” regardless of whether such control is exercised. The Board also stated that “direct” and, if “otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status.” According to the Board, this change was necessary because (1) the Board’s post-1984 limitations on the phrase “share or co-determine” had no basis in law; and (2) the new standard will bring the Board’s approach in line with “changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships.”

The Board did not expand the phrase “terms and conditions” beyond that already endorsed by Board precedent. These “terms and conditions” include, but are not limited to, hiring, firing, discipline, supervision, direction, wages and hours, dictating the number of workers to be supplied, controlling scheduling, seniority, overtime, assigning work and determining the manner and method of work performance.

What Does This Mean?

- The immediate impact of this decision will be felt by companies using franchising, contracting, outsourcing and staffing agency labor. There is already an intense lobbying effort underway in Congress to reject this decision through legislation, and the decision will most likely be challenged in court. How the Board’s decision will impact those businesses already in the general counsel’s cross-hairs, however, remains to be seen.

- The decision could spell trouble for temporary employment agencies and the companies using their services. Under current NLRB rules, a union can organize a bargaining unit of temporary employees and regular employees only if both employers consent. While the NLRB general counsel has stated that the new *Browning-Ferris* “joint employer” standard will not “implicate” this rule, the Board has recently decided to revisit the issue. On July 7, 2015, the NLRB invited briefs to address whether the Board should return to a standard of permitting the inclusion of both solely and jointly employed employees in the same unit without the consent of the employers. If the NLRB does, that could expand the influence of *Browning-Ferris*. Even if the Board does not revisit this rule, temporary staffing agencies and their clients could find themselves to be joint employers of the agencies’ temporary workers under this new decision.

- This decision will likely also impact other areas of the law. The “joint employer” standard imposed by the Board under the NLRA is just one of many “joint employer” standards that may impact companies. The Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA) and the Age Discrimination in Employment Act (ADEA) all have been interpreted to impose “joint employer” liability. Those statutes, however, almost uniformly require the exercise of direct control over employees’ day-to-day activities for “joint employer” liability to attach. The Board’s new *Browning-Ferris* standard may influence the agencies charged with their enforcement, particularly the Department of Labor’s Wage and Hour Division and the Equal Employment Opportunity Commission (EEOC). Both agencies have signaled a desire to revisit the issue. And, most recently, just days in advance of the Board’s *Browning-Ferris* decision, an Occupational Safety & Health Administration draft memorandum leaked out indicating the agency’s interest in pursuing “joint employer” cases against franchisors and their franchisees.

Whether your business is impacted by *Browning-Ferris*, or whether you are dealing with other contingent employment issues such as the impact of using independent contractors or unpaid interns, the Global Employment and Labor practice group at Dentons is ready to help you navigate these complicated areas of the law.

References

See, e.g., Floyd Epperson, 202 NLRB 23, 23 (1973), enfd. 491 F.2d 1390 (6th Cir. 1974); see also Hoskins Ready-Mix Concrete, 161 NLRB 1492, 1493 n. 2 (1966).


One such brief was submitted by the Retail Litigation Center with the assistance of Dentons US LLP.

Oakwood Care Center, 343 NLRB 659 (2004).

General counsel amicus brief, Browning-Ferris at p. 17.

The Department of Labor’s Wage and Hour Division has stated its desire to address “fissuring” in franchising and subcontracting relationships, and the EEOC filed an amicus brief in Browning-Ferris asking the Board to adopt the pre-1984 control standard.

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